BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 6412 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

HELEN N. DI MAGGIO
(Claimant-Appellant)

S.S.A. No.

PRECEDENT
BENEFIT DECISION
No. P-B-347

FORMERLY
BENEFIT DECISION
No. 6412

Referee's Decision
No. SF-3777

STATEMENT OF FACTS

The claimant appealed to a referee from determinations of the Department of Employment which held that the claimant was not entitled to benefits and that she had been overpaid benefits in the amount of $135 and was liable for the repayment thereof under Section 1375 of the California Unemployment Insurance Code. On July 22, 1955, the Appeals Board set aside the decision of the referee and removed the matter to itself under Section 1336 /now section 4137 of the code.

Effective February 17, 1954, the claimant established a claim for unemployment insurance benefits in a San Francisco office of the Department of Employment and was found entitled to an award of benefits payable at the rate of $25 per week. On March 12, 1954, the claimant filed a continued claim form with the department on which she stated that she had not worked and that she had had no earnings during the week ending March 6, 1954. Based on this information furnished by the claimant, she was paid benefits by the department at her full weekly benefit amount of $25 for the week ending March 6, 1954. The department subsequently found that the claimant had worked for an employer and earned wages of $13.28 on March 5, 1954.

On February 16, 1955, the department issued a determination which held that the claimant, because of her earnings of $13.28, had been overpaid benefits in the amount of $10 for the week ending March 6, 1954 and that she was disqualified for benefits for the five-week period from March 14, 1954 through April 17, 1954 under Section 1257(a) of the code on the ground that she had wilfully made a misstatement or wilfully failed to report a material fact to obtain benefits when she failed to report her earnings of March 5, 1954. Also on February 16, 1955, the department issued a notice of overpayment which held the claimant liable to repay the aforementioned $10 and also for repayment of benefits in the amount of $125 paid to her during the five-week disqualification period.

The claimant did not file her appeal to a referee from the determination and notice of overpayment until March 10, 1955. The claimant testified that, upon receipt thereof in the mail, she immediately contacted the department and requested appeal forms which she filed on the day following their receipt. The notice of determination was correctly addressed to the claimant at 854 Bellevue Avenue, Daly City. However, the notice of overpayment was incorrectly addressed to 854 Bellevue Avenue, San Francisco. Both notices were placed by the department in the same window envelope for mailing, and it is not known which of the two was placed in front.

The claimant acknowledged the fact that she worked on March 5, 1954 and earned wages as found by the department; but she testified that she and her husband were both unemployed at the time and, because she was worried over financial matters, she just forgot to report her employment and earnings to the department when claiming benefits for the week ending March 6, 1954.

The issues to be decided are:

1. Did the claimant file a valid appeal from the department's determination and notice of overpayment?

2. Was the claimant, as the result of her earnings, overpaid benefits for the week ending March 6, 1954, and if so is she liable for the repayment thereof?

3. Did the claimant wilfully make a false statement or wilfully fail to report a material fact to obtain benefits for the week ending March 6, 1954?

4. Has the claimant been paid benefits to which she was not entitled for the period from March 14, 1954 through April 17, 1954, and if so is she liable for the repayment thereof?

REASONS FOR DECISION

The first question to be decided in this proceeding is whether the claimant filed a valid appeal to a referee from the department's determination and notice of overpayment. Section 1328 of the Unemployment Insurance Code provides in part as follows:

> "1328. . . . The claimant . . . shall be promptly notified of the determination and the reasons therefor and may appeal therefrom to a referee within 10 days from mailing or personal service of notice of the determination. The 10-day period may be extended for good cause."

Section 1377 of the code relating to the filing of appeals from notices of overpayment contains substantially the same provisions as those relating to appeals from determinations as provided in the above-quoted Section 1328 of the code. In the present case, the claimant did not file her appeal within the 10-day period. However, both notices, one incorrectly addressed, were included in the same window envelope; and it cannot be said with certainty which of the two was exposed to view. The claimant has testified that, upon receipt of the determination and notice of overpayment in the mail, she immediately contacted the department and requested appeal forms which she filed on the day following receipt. Under these facts, it is our opinion the claimant, under the provisions of code Sections 1328 and 1377, has established good cause for the late filing of her appeal and accordingly that she filed a valid appeal.

Section 1279 of the Unemployment Insurance Code provides in pertinent part as follows:

> "1279. Each individual eligible under this chapter who is unemployed in any week shall be paid with respect to that week an unemployment compensation benefit in an amount

> equal to his weekly benefit amount less the amount of wages in excess of three dollars ($3) payable to him for services rendered during that week. The benefit payment, if not a multiple of one dollar ($1), shall be computed to the next higher multiple of one dollar ($1). . . ."

Since the claimant earned wages in the amount of $13.28 during the week ending March 6, 1954, she was entitled to benefits in the amount of $15 based on her weekly maximum benefit amount of $25. Accordingly, since she was paid benefits in the amount of $25 for such week, she is held to have been overpaid benefits in the amount of $10 therefor as found by the department.

Section 1257 of the code provides in part as follows:

> "1257. An individual is also disqualified for unemployment compensation benefits if:
>
> "(a) He wilfully made a false statement or representation or wilfully failed to report a material fact to obtain any unemployment compensation benefits under this division."

The term "wilful" has been defined by the California courts as follows:

> "To do a thing wilfully is to do it knowingly." (People v. Calvert (1928) 93 Cal. App. 568, 269 Pac. 969).
>
> "Conscious; knowing; done with stubborn purpose but not with malice." (Helme v. Great Western Milling Co. (1919) 43 Cal. App. 416, 185 Pac. 510, 512).

In the present case, the claimant contends that she just forgot the fact that she had worked and earned wages of $13.20 /sic/ on March 5, 1954, when completing her weekly continued claim statement and when filing her claim for benefits for the week ending March 6, 1954. In our opinion, however, it is inherently improbable that the claimant, within the few intervening days between the time she performed the work in question and the time she completed and filed her certification for benefits,

could have temporarily forgotten such an important and material fact as a day of work and the receipt of wages during a period of unemployment. Accordingly, we must conclude that the claimant knowingly and, therefore, wilfully failed to report a material fact to the department for the purpose of obtaining benefits. Consequently, she is subject to disqualification for benefits under Section 1257(a) of the code for a period of five weeks beginning March 14, 1954 pursuant to Section 1260 of the code, during which period she was paid benefits in the amount of $125.

Section 1375 of the code provides as follows:

> "1375. Any person who is overpaid any amount as benefits under this division is liable for the amount overpaid unless:
>
> "(a) The overpayment was not due to fraud, misrepresentation or wilful nondisclosure on the part of the recipient, and
>
> "(b) The overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience."

Since we have held that the overpayment in the amount of $10 for the week ending March 6, 1954 arose directly through the fault of the claimant in failing to report her earnings and that the balance of the overpayment in the amount of $125 was created by the claimant's having wilfully failed to report a material fact, it is mandatory under the provisions of Section 1375 that the claimant be held liable for the repayment thereof.

DECISION

The determination and notice of overpayment of the department are affirmed. Benefits are denied as provided

therein and the claimant shall be liable for repayment of the overpayment in the amount of $135.

Sacramento, California, December 30, 1955.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

MICHAEL B. KUNZ, Chairman

GLENN V. WALLS

ARNOLD L. MORSE

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 6412 is hereby designated as Precedent Decision No. P-B-347.

Sacramento, California, May 10, 1977.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

RICHARD H. MARRIOTT

CONCURRING OPINION - Attached

HARRY K. GRAFE

CARL A. BRITSCHGI

CONCURRING OPINION

We concur in the result reached in the instant case, but we are compelled to sound a note of caution as to the qualitative and quantitative nature of the evidence determined by the Board which originally adopted that decision. On page 4 of the decision is the conclusion that:

> ". . . it is inherently improbable that the claimant, within the few intervening days between the time she performed the work in question and the time she completed and filed her certification for benefits, could have temporarily forgotten such an important and material fact as a day of work and the receipt of wages during a period of unemployment. Accordingly, we must conclude that the claimant knowingly and, therefore, wilfully failed to report a material fact to the department for the purpose of obtaining benefits. Consequently, she is subject to disqualification for benefits under Section 1257(a) of the code . . . ." (Emphasis added)

We do not have available to us the record in the original case or the decision of the referee who heard that case, thus we are unable to ascertain whether the referee made the initial finding that the claimant's testimony was "inherently improbable." If the referee did not make such a finding, the Board must refrain from doing so, as the power to so qualify and quantify testimony is one of narrow limits. Witkin, in his compendium on California Procedure (2d Ed, Vol. 6, Part I) points out at page 4242 that the rule that a court may reject uncontroverted testimony as "inherently improbable" is one for the trial judge. If he believes and decides in accordance with the testimony, an appellate court will not make its own evaluation of that testimony as a basis for reversal. Witkin, in his treatise on California Evidence, at page 1029 notes further:

> ". . . The appellate court will not substitute its evaluation of the credibility of witnesses even though to some triers of fact the evidence 'would have seemed so improbable, impossible and unbelievable' as to compel a contrary judgment. (Evje v. City Title Ins. Co. (1953) 120 C.A. 2d 488, 492 [Citation]; People v. Gunn (1959) 170 C.A. 2d 234, 240 [Citation] ['Unusual circumstances are not necessarily inherently improbable']; People v. Wilburn (1961) 195 C.A. 2d 702, 706 [Citation]; People v. Swanson (1962) 204 C.A. 2d 169, 172 [Citation])."

An authoritative example of the application of the foregoing principles is found in the recent decision of the California Supreme Court in People v. Mayberry (1975), 15 Cal 3d 143:

> "In arguing that the prosecutrix' testimony is inherently improbable, defendants point to the fact that the prosecutrix did not report the assault in front of the liquor store to the police from a telephone that was available near the grocery store; that she did not physically resist Franklin after the initial encounter; that she failed to attempt to flee or obtain help even though there were opportunities for her to do so; that there was no evidence Franklin was armed; and that she had a 'lighted cigarette just prior to the time that [she] left [defendants' apartment],' suggesting thereby, in some way, a friendly parting.
>
> "We have previously considered the requisite quantum of evidence to meet a challenge of 'improbability.' (1) In People v. Headlee, 18 Cal. 2d 266, 267, 268, [Citation] we noted that 'To be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed.' More recently, in People v. Thornton, 11 Cal. 3d 738, 754, [Citation] we reaffirmed the following language from People v. Huston, 21 Cal. 2d 690, 693 [Citation]: 'Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]'

> "Viewed in the light of the foregoing expressions, it cannot be said that the prosecutrix' testimony is inherently improbable. She testified that, although she was aware of the telephone by the grocery store, she did not think of it and planned to call the police from her home. She explained that she did not physically resist Franklin after the initial encounter because she was afraid of him. Although they were about the same size and there was no evidence he was armed, she had been threatened, struck, and knocked down and the jury, which had an opportunity to observe them and hear their testimony, could well have concluded that her fear was not unreasonable. She explained her failure to flee on the ground she could not run fast due to her stiff leg. Her failure to elicit help from others (e.g., persons at the grocery store) might have been deemed suspicious, but it was also susceptible to a conclusion that she was too frightened to think clearly. Her testimony that '*[she]* did have a lighted cigarette just prior to the time that *[she]* left *[defendants'* apartment*]*,' which testimony is not amplified, is not significant and discloses at most an unusual circumstance." (15 Cal 3d at 149-150)

Likewise, in the case which is the subject of this Board's attention, although it may seem unusual and peculiar that a claimant could have forgotten that she had worked and earned wages just a few days before she filed her unemployment insurance claim, it is not for the Board to characterize such testimony as "inherently improbable" unless such was the finding of the referee.

Moreover, and equally important, it must not be inferred from the case now before us that a claimant's story must be "inherently improbable" for it to be a wilful false statement within the meaning of §1257(a). Any indication that this case stands for such a proposition is specifically rejected.

Finally, we call attention to the rule that:

". . .Although the story of a party or other witness may be so unworthy of belief that the trial judge may disregard his testimony, the judge cannot reject it out-of-hand and reach his decision without a fair hearing of the evidence."
(Witkin, California Evidence, 2nd Ed, p. 1029, citing Ponce v. Marr (1956), 47 Cal 2d 159, 163).

Thus, Administrative Law Judges are better advised to overlook the reference to inherent improbability in the subject case and to conduct hearings and make their findings on the basis of the general standards applicable to tests of credibility of witnesses (see Evidence Code §780 and Appeals Board Decision No. P-T-13).

HARRY K. GRAFE

CARL A. BRITSCHGI